

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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916 RADIO, a California non-
profit corporation; SAUNDRA
"DJ RENE E" GRIFFIN, and KEVIN
ARDOIN,

NO. CIV. 05-CV-00719 FCD DAD

Plaintiffs,

v.

MEMORANDUM AND ORDER

FEDERAL COMMUNICATIONS
COMMISSION,

Defendant.

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This matter is before the court on defendant Federal Communications Commission's ("defendant" or "FCC") motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). By this motion, defendant seeks to dismiss plaintiffs' complaint on the grounds that plaintiffs lack standing to pursue their claims, plaintiffs' claims are substantively meritless, and/or this court lacks subject matter jurisdiction.¹

¹ This court previously denied the FCC's motion to dismiss pursuant to Federal Rules of Civil Procedure 8(a). (Mem. & Order, filed Sept. 1, 2005.)

For the reasons set forth below, the court GRANTS defendant's motion to dismiss in its entirety.²

BACKGROUND³

4 Plaintiffs are a group of persons and organizations engaged
5 in "microradio" (low-power FM Radio) broadcasting in Sacramento,
6 California. Plaintiff 916 Radio is a nonprofit educational
7 corporation that has operated a microradio station in
8 Sacramento's midtown district since May 19, 2004. Plaintiff DJ
9 Renee is a member of plaintiff 916 Radio and is a DJ on Saturday
10 mornings from 10:00 a.m. to 12:00 p.m. Plaintiff Kevin Ardoin is
11 a resident of Sacramento, California and a regular listener of
12 plaintiff 916 Radio's microradio broadcasts.

13 Plaintiffs allege that on January 3, 2005, Will Major
14 ("Major"), 916 Radio's manager, answered a phone call from a
15 person representing the FCC. Major was advised that the call was
16 in response to several complaints suggesting that 916 Radio was a
17 "pirate radio station." Major explained to the FCC caller that
18 916 Radio was complying with all LPFM-318 (federal) regulations.
19 Additionally, Major explained that the FCC Media Department had
20 told 916 Radio that it was legally allowed to operate in its
21 present manner. The FCC caller told Major that if anyone else
22 called to complain, he would refer the person to 916 Radio
23 directly.

² Because oral argument will not be of material assistance, the court orders the matter submitted on the briefs. E.D. Cal. L.R. 78-230(h).

³ The background section is based on the allegations of plaintiffs' complaint, filed April 12, 2005.

1 Plaintiffs further allege that on January 5, 2005, federal
2 agents Glenn Phillips ("Phillips") and Thomas Hora ("Hora") came
3 to 916 Radio's premises and advised Major that a "non-specific
4 complaint" had been filed against 916 Radio. Major gave Phillips
5 and Hora permission to search the premises. Major explained that
6 the FCC Media Center had told the station that it was "okay" as
7 long as it complied with LPFM-318 regulations. Phillips and Hora
8 asked to see the radio transmitter, and after viewing it, told
9 Major that the transmitter was out of compliance and not FCC
10 certified. Phillips and Hora then recommended that Major
11 terminate broadcasting, adding that further broadcasting could
12 result in a \$100,000 fine, one year of imprisonment, or
13 confiscation of the broadcasting equipment. Phillips and Hora
14 left a "Notice of Unlicensed Radio Operation" which indicated the
15 station's power output exceeded the allowable limits.

16 Finally, plaintiffs allege that on January 12, 2005, an FCC
17 agent or agents returned to 916 Radio premises, but Major refused
18 to open the door. The agent or agents then left another "Notice
19 of Unlicensed Radio Operation" which indicated 916 Radio's output
20 exceeded the allowable limits, and 916 Radio refused to allow
21 inspection of the premises.

22 Thereafter, on April 12, 2005, plaintiffs filed the instant
23 complaint against the FCC. Plaintiffs allege (1) that 47 U.S.C.
24 § 510 as applied to microradio stations without procedural
25 safeguards violates the 1st, 4th, and 5th Amendments to the
26 United States Constitution; (2) that the FCC's enforcement policy
27 of ordering microbroadcasters to cease and desist broadcasting
28 activities without procedural safeguards violates the 1st, 4th,

1 and 5th Amendments to the United States Constitution; (3) that
2 the FCC's enforcement policy of demanding that microradio
3 stations cease and desist without an administrative hearing
4 violates 47 U.S.C. §§ 312(c)-(d); and (4) that the FCC's failure
5 to provide efficient, reasonable, and fair licensing procedures
6 for low-powered radio stations is an abuse of discretion under
7 the Administrative Procedures Act, 5 U.S.C. § 702.

8 The FCC now moves to dismiss all of plaintiffs' claims,
9 arguing with respect to claims one through three, that plaintiffs
10 lack standing to challenge Communications Act provisions and FCC
11 procedures and/or that plaintiffs' claims are substantively
12 meritless, and with respect to plaintiffs' fourth claim, that the
13 court lacks subject matter jurisdiction and/or plaintiffs lack
14 standing.

STANDARD

I. Rule 12(b)(1)

Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a party may by motion raise the defense that the court lacks "jurisdiction over the subject matter" of a claim. Fed. R. Civ. P. 12(b)(1). It is well established that the party seeking to invoke the jurisdiction of the federal court bears the burden of establishing the court's subject matter jurisdiction. Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989).

25 A motion to dismiss for lack of subject matter jurisdiction
26 may attack the allegations of jurisdiction contained in the
27 complaint as insufficient on their face to demonstrate the
28 existence of jurisdiction ("facial attack"). Thornhill

1 Publishing Co. v. General Tel. & Elec. Corp., 594 F.2d 730, 733
2 (9th Cir. 1979). If the motion constitutes a facial attack, the
3 court must consider the factual allegations of the complaint to
4 be true. Williamson v. Tucker, 645 F.2d 404, 412 (5th Cir.
5 1981).

6 **II. Rule 12(b) (6)**

7 On a motion to dismiss pursuant to Rule 12(b) (6) of the
8 Federal Rules of Civil Procedure, the allegations of the
9 complaint must be accepted as true. Cruz v. Beto, 405 U.S. 319,
10 322 (1972). The court is bound to give plaintiff the benefit of
11 every reasonable inference to be drawn from the "well-pleaded"
12 allegations of the complaint. Retail Clerks Int'l Ass'n v.
13 Schermerhorn, 373 U.S. 746, 753 n.6 (1963). Thus, the plaintiff
14 need not necessarily plead a particular fact if that fact is a
15 reasonable inference from facts properly alleged. See id.

16 Given that the complaint is construed favorably to the
17 pleader, the court may not dismiss the complaint for failure to
18 state a claim unless it appears beyond a doubt that the plaintiff
19 can prove no set of facts in support of the claim which would
20 entitle him or her to relief. Conley v. Gibson, 355 U.S. 41, 45
21 (1957); NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir.
22 1986).

23 Nevertheless, it is inappropriate to assume that plaintiff
24 "can prove facts which it has not alleged or that the defendants
25 have violated the . . . laws in ways that have not been alleged."
26 Associated Gen. Contractors of Cal., Inc. v. Cal. State Council
27 of Carpenters, 459 U.S. 519, 526 (1983). Moreover, the court
28 "need not assume the truth of legal conclusions cast in the form

1 of factual allegations." United States ex rel. Chunie v.
2 Ringrose, 788 F.2d 638, 643 n.2 (9th Cir. 1986).

3 In ruling upon a motion to dismiss, the court may consider
4 only the complaint, any exhibits thereto, and matters which may
5 be judicially noticed pursuant to Federal Rule of Evidence 201.
6 See Mir v. Little Co. Of Mary Hosp., 844 F.2d 646, 649 (9th Cir.
7 1988); Isuzu Motors Ltd. v. Consumers Union of United States,
8 Inc., 12 F. Supp. 2d 1035, 1042 (C.D. Cal. 1998).

9 **ANALYSIS**

10 **I. Claims One Through Three**

11 The FCC asserts that plaintiffs lack standing to pursue
12 claims one through three which allege (1) that 47 U.S.C. § 510
13 ("§ 510") as applied to microradio stations without procedural
14 safeguards violates the 1st, 4th, and 5th Amendments to the
15 United States Constitution; (2) that the FCC's enforcement policy
16 of ordering microbroadcasters to stop and/or cease and desist
17 broadcasting activities without procedural safeguards violates
18 the 1st, 4th, and 5th Amendments to the United States
19 Constitution; and (3) that the FCC's enforcement policy of
20 demanding that microradio stations stop and/or cease and desist
21 without an administrative hearing violates 47 U.S.C. §§ 312(c)-
22 (d) ("§ 312").

23 Article III of the United States Constitution limits
24 jurisdiction of federal courts to deciding cases and
25 controversies. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559
26 (1992). The doctrine of standing is a core component of the
27 case-or-controversy requirement. Id. at 560. The litigant
28 invoking federal jurisdiction must establish the three minimum

1 requirements of standing: (1) a litigant must have suffered an
2 actual and concrete injury consisting of an invasion of a legally
3 protected interest; (2) there must be a causal connection between
4 the injury and the conduct of which the litigant complains; and,
5 (3) there must be a likelihood that the injury will be redressed
6 by a favorable judicial decision. Id. at 560-61.

7 Plaintiffs' claims here mirror those alleged by the
8 plaintiffs in Free Speech v. Reno, 1999 WL 146643 (S.D.N.Y. Mar.
9 18, 1999), *affirmed per curiam*, 200 F.3d 63 (2nd Cir. 1999)
10 (holding district court "properly dismissed plaintiffs' as-
11 applied challenges to the [FCC] enforcement provisions [§§ 312
12 and 510] for lack of standing"). There, the plaintiffs began
13 operating an unlicensed radio station in November 1995. Id. at
14 *1. In March 1998, an FCC official visited the station and
15 notified the plaintiffs that the FCC had received a complaint
16 that the plaintiffs' radio station was interfering with the
17 signal of a licensed radio station. Id. The FCC official stated
18 he would return to seize the station's broadcasting equipment if
19 the plaintiffs did not stop broadcasting. Id. On March 6, 1998,
20 the plaintiffs decided to go off the air. Id. Five days later,
21 the FCC official returned to the plaintiffs' station and shut off
22 the building's electricity. Id. On April 15, 1998, plaintiffs
23 resumed broadcasting from a new location and shortly thereafter
24 filed their complaint against the defendants Janet Reno and the
25 FCC. Id.

26 The Free Speech plaintiffs alleged, inter alia, (1) that the
27 FCC property forfeiture statute, § 510, as applied by the
28 defendants to microradio stations, violated the First, Fourth,

1 and Fifth Amendments; (2) that the FCC enforcement policy
2 regarding cease and desist orders created a system of formal and
3 informal prior restraints and thereby violated the First, Fourth,
4 and Fifth Amendments; and (3) that the FCC enforcement policy of
5 executing cease and desist orders without serving violators an
6 order to show cause at least 30 days before an administrative
7 hearing violated §§ 312(c)-(d). Id. at *1-2. The defendants
8 contended that the plaintiffs lacked standing to pursue these
9 claims because they failed to show that they had suffered an
10 "injury-in-fact," establishing the first element for
11 constitutional standing. Id. at *3.

12 The district court agreed with the defendants and held that
13 the plaintiffs failed to allege facts sufficient to establish
14 that they had suffered an injury-in-fact under the challenged
15 provisions. Id. at *4. The court reasoned that the threat was
16 too attenuated to provide the plaintiffs with a basis for
17 standing. Id. Moreover, the court found that the issues raised
18 were not ripe for judicial review. Id. According to the court,
19 without a particularized injury, the plaintiffs' claims presented
20 only an "abstract constitutional grievance." Id. The court
21 concluded that because the defendants had not *applied* in rem
22 forfeiture or cease and desist proceedings to the plaintiffs,
23 they lacked standing to raise as-applied challenges to the FCC
24 provisions. Id. at *4-5.

25 Similarly, in the instant case, plaintiffs have failed to
26 demonstrate anything more than an "abstract constitutional
27 grievance." When plaintiffs filed their complaint on April 12,
28 2005, they had received two "Notices of Unlicensed Radio

1 Operation." Each notice stated in part:

2 You are hereby warned that operation of radio
3 transmitting equipment without a valid radio
4 station authorization and/or refusal to allow
5 inspection of your radio station constitutes
6 violation of the Federal laws cited above and
7 could subject the owner of this illegal
8 operation to the several penalties provided,
including, but not limited to, a maximum
criminal fine of \$100,000 and/or one year
imprisonment, or arrest of the equipment for
the first offense (see 49 U.S.C. §§ 501, 503
& 510).

9 (Compl., filed Apr. 12, 2005, Exhs. 1 & 2) (emphasis added). The
10 notices thus warned of the potential penalties for continuing to
11 operate the radio station without a license. Nothing in the
12 notices indicated that plaintiffs were being penalized pursuant
13 to one of the challenged statutory sections. Accordingly,
14 plaintiffs have failed to allege a particularized "injury-in-
15 fact" under the challenged provisions and therefore lack standing
16 to pursue claims one through three. Free Speech, 1999 WL 146643,
17 at *4.

18 Alternatively, with respect to claims two and three, this
19 court also lacks jurisdiction over plaintiffs' claims. As stated
20 in Free Speech, the doctrine of primary jurisdiction requires
21 that a party who wishes to challenge an FCC policy or practice
22 first do so through a motion for a declaratory ruling from the
23 FCC itself. 1999 WL 14773, at *2; FCC v. ITT World Commc'ns, 466
24 U.S. 463, 468 n.5 (1984) (stating that respondents should have
25 challenged agency's conduct by motion before agency for
declaratory ruling).⁴ Plaintiffs second and third claims attack

27 ⁴ The Communications Act grants exclusive authority to
28 (continued...)

1 "the FCC's enforcement policy and practice of demanding . . .
2 that microbroadcasters immediately stop and/or cease and desist
3 all broadcasting activities" (Compl. ¶¶ 55, 57).
4 Because plaintiffs assert claims against FCC policies and
5 practices, this court lacks jurisdiction over claims two and
6 three.

7 Accordingly, plaintiffs have failed to show that they have
8 suffered a particularized injury under the subject FCC provisions
9 sufficient to confer standing. Alternatively, with respect to
10 claims two and three, the court lacks jurisdiction. For these
11 reasons, the FCC's motion to dismiss claims one through three is
12 GRANTED.⁵

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15 ⁴(...continued)
16 the FCC to license radio broadcasting in the United States. 47
17 U.S.C. §§ 151, 301. In order to obtain a license, a party
18 seeking to broadcast must submit a written application to the FCC
19 containing information required by 47 U.S.C. § 308 and other FCC-
20 prescribed qualifications. If an applicant for a broadcast
21 license does not meet the FCC's requirements, it may request a
22 waiver of the relevant rules in conjunction with its application
23 for a license. 47 C.F.R. § 1.3. If the FCC denies an
24 application for a license or waiver of its rules, the applicant
25 must appeal to the United States Court of Appeals for the
District of Columbia. 47 U.S.C. § 402(b)(1); United States v.
Dunifer, 997 F. Supp. 1235, 1238 n.4 (N.D. Cal. 1998). A party
wishing to challenge a final order of the FCC may do so in any
court of appeals. 47 U.S.C. § 402(a); 28 U.S.C. 2342. Courts
have interpreted "order" to also mean FCC regulations, rules,
policies, procedures, decisions, and actions. See Dunifer, 997
F. Supp. at 1238 (stating that exclusive jurisdiction over any
challenge to FCC regulations is vested in courts of appeals);
United States v. Neset, 10 F. Supp. 2d 1113, 1114-15 (D. N.D.
1998) (stating that Communications Act gives courts of appeals
exclusive jurisdiction to review the FCC's declaratory rulings as
well as all policies, practices, and regulations adopted by the
FCC).

27
28 ⁵ As such, the court need not reach the substantive
merits of the claims.

1 **II. Claim Four**

2 The FCC contends that the court lacks subject matter
3 jurisdiction over claim four which alleges that "the FCC's
4 failure to provide efficient, reasonable and fair licensing
5 procedures for LPFM radio stations is an abuse of discretion
6 under the Administrative Procedures Act" (Complaint ¶
7 59). The court agrees.

8 As previously stated, challenges to FCC enforcement policies
9 and procedures must first be brought before the FCC. The Ninth
10 Circuit has repeatedly upheld dismissal of claims challenging the
11 FCC's policies and procedures for lack of subject matter
12 jurisdiction. See United States v. Dunifer, 219 F.3d 1004 (9th
13 Cir. 2000) (holding that district court lacked subject matter
14 jurisdiction under applicable statutory framework to decide
15 challenges to FCC licensing regulations); Wilson v. A.H. Belo
16 Corp., 87 F.3d 393 (9th Cir. 1996) (affirming dismissal because 47
17 U.S.C. § 402(a) and 27 U.S.C. § 2342 vest courts of appeals with
18 exclusive jurisdiction to review validity of FCC rulings); Sable
19 Commc'ns of Cal., Inc. v. FCC, 827 F.2d 640 (9th Cir. 1987)
20 (holding that district court lacked jurisdiction over action
21 claiming that FCC regulation unconstitutionally restricted
22 sexually suggestive telephone services). Because plaintiffs
23 challenge FCC licensing procedures in claim four, this court
24 lacks jurisdiction over this claim.

25 Accordingly, the FCC's motion to dismiss claim four for lack
26 of subject matter jurisdiction is GRANTED.

1 **III. Leave to Amend**

2 On June 29, 2005, subsequent to the filing of the complaint,
3 plaintiffs received a "Notice of Apparent Liability for
4 Forfeiture" ("NALF") from the FCC.⁶ The NALF assessed a civil
5 monetary penalty against plaintiffs pursuant to § 503(b) of the
6 Communications Act ("§ 503"). Both parties acknowledge that this
7 administrative proceeding is currently pending before the FCC.
8 The court notes nonetheless that as a result of this government
9 action, there is now more than a "mere threat of action" by the
10 FCC, and plaintiffs would have *standing* to raise a claim under
11 § 503(b). Ordinarily, the court would allow a party to amend its
12 complaint in light of changed circumstances such as these.
13 However, 28 U.S.C. § 2342(1) provides that "the court of appeals
14 . . . has exclusive jurisdiction to enjoin, set aside, suspend
15 (in whole or in part), or to determine the validity of (1) all
16 final orders of the Federal Communications Commission . . ."
17 As such, jurisdiction in this court does not lie. The pending
18 claims must proceed before the FCC in the first instance, and
19 once finalized, can be challenged only in the court of appeals.
20 28 U.S.C. § 2342(1); 47 U.S.C. § 402. Thus, the court does not
21 grant leave to amend because despite constitutional standing to
22 raise a claim under 503(b), this court, by statute, lacks
23 jurisdiction to hear the claim.

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⁶ Though defendant failed to request that this court take
27 judicial notice of Exhibit A attached to its Memorandum of Points
28 and Authorities, this court finds that it is a subject of proper
judicial notice under Federal Rules of Evidence 201.

CONCLUSION

For the reasons set forth above, defendant's motion to dismiss plaintiffs' complaint pursuant to Rules 12(b)(1) and 12(b)(6) is GRANTED. The Clerk of the Court is directed to close this file.

IT IS SO ORDERED.

DATED: November 8, 2005

/s/Frank C. Damrell, Jr.
FRANK C. DAMRELL, Jr.
UNITED STATES DISTRICT JUDGE